

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2351

To be argued by
WILLIAM EPSTEIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
MICHAEL HILL,

Petitioner-Appellant,

-against-

VITO TERNULLO, Superintendent,
Elmira Correctional Facility,

Respondent-Appellee.

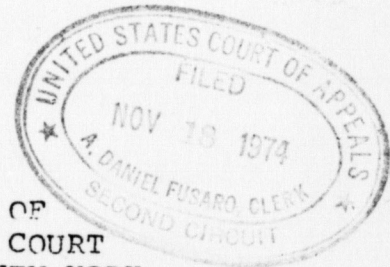
Docket No. 74-2351

APPENDIX

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
DENYING A PETITION FOR WRIT OF HABEAS CORPUS

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Petitioner-
Appellant MICHAEL HILL
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

WILLIAM EPSTEIN,
Of Counsel



3

PAGINATION AS IN ORIGINAL COPY

UNITED STATES DISTRICT COURT

Jury demand date:

D. C. Form No. 106 Rev.

Civ-1973-323

TITLE OF CASE

ATTORNEYS

United States ex rel MICHAEL HILL

For plaintiff: pro se

vs

Elmira Correctional Facility
Elmira NY

VITO TERNULLO, Superintendent
Elmira Correctional Facility

For defendant: Louis J. Lefkowitz, Esq
Attorney General State of New York

STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

DISB.

J.S. 5 mailed

Clerk

J.S. 6 mailed

Marshal

Basis of Action:

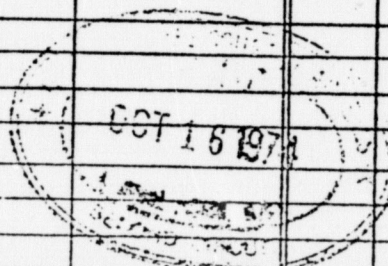
Habeas Corpus

Docket fee

Witness fees

Action arose at:

Depositions



Civ-1973-323 US ex rel Michael Hill vs Vito Ternullo, etc.

DATE	PROCEEDINGS	Date of Judgment
1973		
July 2	Filed Petition	
2	" Order that respondent to show cause why a writ of habeas corpus should not issued and produce record on appeal to App. Div. w/brief of respective parties in the App. Div.; filing in forma pauperis allowed, ret. 7/23/73. Burke DJ Notices to Petr. & Lefkowitz	
2	JS 5 made	F-1
Oct. 9	Filed Findings of Fact & Conclusion of Law Petr. application for writ of habeas corpus is denied, cert. of probable cause denied, to appeal in forma pauperis is denied but may file with Clerk notice of appeal w/o prepayment of filing fee-Burke, DJ	F-14
Oct. 9	JS 6 made	
1974		
Feb. 19	File sent to U.S. Court of Appeals	
Oct. 11	File returned from CCA	
11	Filed copy of order of CCA granting certificate of probable cause, leave to appeal in forma pauperis and assignment of counsel and denying release on recognizance or bail	

CLOSED

STATE OF NEW YORK

COUNTY COURT

COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

MICHAEL HILL,
ALONZO DUKES,

Defendants.

JUNE 29, 1970

HALL OF JUSTICE, ROCHESTER, NEW YORK

PRESIDING:

HON. GEORGE D. OGDEN, Monroe County
Court Judge.

APPEARANCES:

JACK B. LAZARUS, ESQ., Monroe County
District Attorney, appearing on
behalf of the People of the State
of New York, by RAYMOND CORNELIUS,
ESQ., Assistant District Attorney.

Defendant Michael Hill in person
and represented by GERALD DORSEY,
ESQ., by JAMES IANNUZO, ESQ., of
counsel.

Defendant Alonzo Dukes in person
and represented by SIDNEY DAVIDSON,
ESQ.

PLEA - SENTENCE

MR. CORNELIUS: Michael Hill; Alonzo Dukes.

MR. IANNUZO: Your Honor, I am appearing of counsel for the
attorney who is representing Mr. Hill, and we would at
this time wish to enter a plea as discussed with Mr.
Cornelius.

THE COURT: Well, just a moment.

MR. CORNELIUS: You are Michael Hill?

DEFT. HILL: Yes, sir.

MR. CORNELIUS: Mr. Hill, you are represented by Mr. Dorsey, and you appear with Mr. Iannuzo this morning; is that correct?

DEFT. HILL: Yes, sir.

MR. CORNELIUS: That is acceptable to you?

DEFT. HILL: Yes.

THE COURT: Is that satisfactory to you?

DEFT. HILL: Yes.

MR. CORNELIUS: And Alonzo Dukes, you are represented and appear with Mr. Davidson; is that correct?

DEFT. DUKES: Yes, sir.

MR. CORNELIUS: You are Alonzo Dukes?

DEFT. DUKES: Yes.

MR. CORNELIUS: Michael Hill and Alonzo Dukes, you both have entered pleas of not guilty to two indictments, Indictment No. 222, charging robbery in the first degree in two counts, and the crime of grand larceny in the third degree; and also not guilty to Indictment No. 223, which accuses you both of robbery in the first degree and also attempt to commit the crime of grand larceny in the third degree; and with respect to Michael Hill,

the crime of attempt to commit the crime of murder.

I understand from both of your counsel this morning that if permitted to do so by Judge Ogden and upon the recommendation of the District Attorney's Office, you would be desirous of entering a plea of guilty to robbery in the second degree, in full satisfaction of the counts contained in Indictment Nos. 222 and 223; is that correct?

DEFT. HILL: Yes, sir.

DEFT. DUKES: Yes, sir.

MR. CORNELIUS: At this time, Your Honor, the People would recommend to the Court that the Court accept a plea of guilty to robbery in the second degree in full satisfaction of the counts contained in both indictments.

We have had several discussions with Your Honor with respect to this case, and the People feel that because of the ages of these defendants and their background, that some consideration should be shown, and in the interest of justice we feel that a plea of guilty to robbery in the second degree would satisfy the interest of justice.

THE COURT: The recommendation is approved.

MR. CORNELIUS: Michael Hill, I now ask you how you plead to

the crime of robbery in the second degree, in full satisfaction of the counts contained in Indictment Nos. 222 and 223?

DEFT. HILL: Guilty, sir.

MR. CORNELIUS: Are you entering that plea of guilty after consulting with your attorney and upon his advice and consent?

DEFT. HILL: Yes, sir.

MR. CORNELIUS: Have any threats or any promises been made to you to induce you to plead guilty?

DEFT. HILL: No, sir.

MR. CORNELIUS: You are doing so voluntarily and of your own free will?

DEFT. HILL: Yes, sir.

THE COURT: You realize, Mr. Hill, that you may be sent to prison as a result of your conviction of this crime?

DEFT. HILL: Yes, sir.

THE COURT: Do you realize that?

DEFT. HILL: Yes, sir.

MR. CORNELIUS: Alonzo Dukes, I ask you how you plead to the crime of robbery in the second degree, in full satisfaction of the counts and the charges contained in Indictment Nos. 222 and 223?

DEFT. DUKES: I plead guilty, sir.

MR. CORNELIUS: Are you entering that plea of guilty after consulting with your attorney and upon his advice and consent?

THE COURT: Mr. Cornelius, has there been any recommendation as far as Dukes is concerned?

MR. CORNELIUS: I made the recommendation on both the defendants. But, for the record, I would, for the same reasons I previously stated, I would make the recommendation with respect to Mr. Dukes.

THE COURT: That he be allowed to plead to robbery in the second degree in full satisfaction of both indictments on all charges?

MR. CORNELIUS: That is correct.

THE COURT: The recommendation is approved.

MR. CORNELIUS: Alonzo Dukes, I now ask you how you plead to the crime of robbery in the second degree, in full satisfaction of Indictment Nos. 222 and 223?

DEFT. DUKES: Guilty, sir.

MR. CORNELIUS: Have any promises or threats been made to induce you to plead guilty?

DEFT. DUKES: No, sir.

MR. CORNELIUS: This plea is upon the advice and consent of

your counsel; is that correct?

DEFT. DUKES: Yes, sir.

MR. CORNELIUS: You are doing so of your own free will and voluntarily?

DEFT. DUKES: Yes, sir.

THE COURT: Do you realize, Mr. Dukes, that upon your conviction for this offense, that you may be sent to prison?

DEFT. DUKES: Unfortunately, yes, sir.

MR. IANNUZO: Your Honor, we waive the two-day period for sentencing.

MR. DAVIDSON: We waive the two days.

THE CLERK: Alonzo Dukes and Michael Hill, please raise your right hands. Do you solemnly swear that you shall true answers make to such questions as shall be put to you pursuant to the provisions of the statute, so help you God?

DEFT. HILL: I do.

DEFT. DUKES: I do.

THE COURT: All right. Call it later.

(Whereupon the case was called later and the following transpired.)

MR. CORNELIUS: Michael Hill.

Are you Michael Hill?

DEFT. HILL: Yes, sir.

MR. CORNELIUS: You again appear with Mr. Iannuzo, who appears on behalf of Mr. Dorsey?

DEFT. HILL: Yes, sir.

MR. CORNELIUS: This is satisfactory to you, is it not?

DEFT. HILL: Yes, sir.

MR. CORNELIUS: The People move the sentence.

THE CLERK: Michael Hill, have you any legal cause to show why judgment of the Court should not now be pronounced upon you?

DEFT. HILL: No.

THE COURT: Is there anything you wish to say, Mr. Iannuzo?

MR. IANNUZO:: Only that Your Honor and Mr. Dorsey have discussed this extensively, and I do not believe I could add anything to that, Your Honor.

THE COURT: Mr. Cornelius?

MR. CORNELIUS: The People have nothing to add, Your Honor.

THE COURT: Michael Hill, I have talked at some length with your father and mother. They have advanced all the good qualities upon you that they know.

I have also received many letters and had many conferences with your attorney, Mr. Dorsey. I am not

deaf to the pleas of those that know you in the Town of Webster; ministers, school authorities, citizens of the Town of Webster. They have all spoken well of you. The only trouble is, they do not know what to do when you are not in their observation. They have not any idea or had no idea of the robberies that you and Dukes admitted to.

You are both intelligent personable young men, and to be involved in a series of armed robberies where shootings occurred somewhat defies reason.

You and Dukes elected to leave your respective homes and take up a life of crime. You are both seventeen years old; and one of the offenses that you, Hill, are guilty of, was pistol whipping an old man in a wheelchair for no reason whatever, aside from shooting at one of these store proprietors. If I ever saw a real case of Dr. Jekyll and Mr. Hyde, it is you and Dukes.

Upon your plea of guilty to the crime of robbery in the second degree, which count is included in the crimes charged in both indictments, and which plea of guilty is accepted in full satisfaction of the crimes alleged in both indictments, the sentence of the Court is, Michael Hill, that you be sentenced to an

indeterminate sentence of imprisonment, which shall have a maximum term of fifteen years and a minimum term of imprisonment of five years; and that you be committed to the custody of the New York State Department of Correction, and be delivered to the Reception Center at Elmira, New York; there to be dealt with in accordance with the laws pertaining to your sentence.

The minimum sentence is imposed pursuant to Section 70 of the Penal Law, and the reasons are stated also pursuant to that section.

The crimes in which you participated are those of violence, senseless, unnecessary, and it is the opinion of the Court that because of the crimes which you have committed there should be a minimum sentence imposed as well as a maximum. That is all.

MR. CORNELIUS: Alonzo Dukes.

You are Alonzo Dukes?

DEFT. DUKES: Yes, I am.

MR. CORNELIUS: You appear with Mr. Davidson, your attorney?

DEFT. DUKES: Yes, sir.

MR. CORNELIUS: The People move the sentence of the case of Alonzo Dukes.

THE CLERK: Alonzo Dukes, have you any legal cause to show why

FILED

OCT 9 9 13 AM '73

United States District Court

U.S. DISTRICT COURT
N.Y.

FOR THE WESTERN DISTRICT OF NEW YORK

CIV - 1978 - 323

United States ex rel MICHAEL HILL

- vs -

VITO TERNULLO, Superintendent,
Elmira Correctional Facility

Decision

FINDINGS OF FACT

and

CONCLUSION OF LAW

BURKE, DISTRICT JUDGE

3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

United States ex rel MICHAEL HILL

- vs -

VITO TERNULLO, Superintendent,
Elmira Correctional Facility

Gerald R. Barrett
80 Main Street East
Webster, N.Y.
Attorney for petitioner

Ronald M. Singer
Assistant Attorney General of New York
63 Broad Street
Rochester, N.Y. 14614
Attorney for respondent

FINDINGS OF FACT

1. The petitioner is held on a judgment of the Monroe County Court entered June 29, 1970 following his guilty plea to the charge of robbery in the second degree. He was sentenced to an indeterminate term of imprisonment having a minimum of five years and a maximum of 15 years.

2. On April 30, 1970 the defendant and a co-defendant named Dukes were arraigned and pleaded not guilty to all of the counts under which they were charged in two separate indictments, each filed April 24, 1970.

Indictment 222 charged both defendants with two counts of robbery in the first degree and one count of grand larceny in the third degree. Indictment 223 charged both defendants with two counts of attempted robbery in the first degree and one count of attempted grand larceny in the third degree, and also charged Hill alone with one count of attempted murder. Hill's guilty plea was accepted in full satisfaction of all counts against him in both of the indictments. The Appellate Division unanimously affirmed the judgment of conviction and sentence on December 2, 1971. In the Appellate Division the petitioner asserted 13 grounds of alleged error for reversal. They are as follows:

(1) The robberies attributed to him by the sentencing judge were illegal and prejudicial hearsay.

(2) Allegations that he pistol-whipped an elderly man were illegal and prejudicial hearsay.

(3 & 4) The pre-plea investigation report by the Probation Department contained illegal and prejudicial hearsay concerning crimes of which appellant had not been convicted.

(5) His sentence was exorbitant.

(6) The trial court illegally imposed a minimum sentence.

(7) He was illegally convicted of robbery in the second degree because he was not charged with that crime and did not commit that crime.

(8) Prejudicial error was committed because the trial court did not order a mental examination of appellant.

(9) The failure of the pre-plea report to include the history of appellant's "love-pattern" was prejudicial error.

(10) He has an affirmative defense of mental disease or defect.

(11) The trial court erred by failing to inquire into the facts of the crime to which appellant pleaded guilty.

(12) The trial court, in accepting his plea, failed to advise appellant that he was thereby waiving certain constitutional rights.

(13) His plea was involuntary because his attorney misinformed him as to the sentence he might receive.

3. Pursuant to an order of this court dated June 29, 1973, the respondent has produced for this court's examination the transcript of the proceedings at

the arraignment and at the occasion of the entry of the petitioner's plea of guilty and sentence on June 29, 1970 together with the briefs of the respective parties in the Appellate Division. The presence of the petitioner was not required on the return of this court's order of June 29, 1973.

4. On July 23, 1973, the return day of this court's order of June 29, 1973, the petitioner appeared by attorney Gerald R. Barrett. The only thing that occurred on the return of the order of this court was the presentation by the petitioner's attorney to this court of a letter dated July 12, 1973 to Gerald R. Barrett, from Gerald L. Dorsey, which reads as follows: "To the best of my recollection, at the time Michael Hill was sentenced, there was some confusion, on my part, concerning his sentence. It was my understanding that the sentence was from five to fifteen years. This meant that with good behavior he would be out in two-thirds of the minimum time, or approximately two years. As I recall, this is the way it was explained to Michael. Thereafter, as I recollect, there was a change in the law and he was required to serve the full minimum term." Pursuant to questioning by the court it was established that the petitioner had been

represented in the Monroe County Court by Gerald L. Dorsey as his retained attorney. Although Dorsey was his attorney, he was represented on the occasion of the plea and sentence by James M. Iannuzo, a member of Dorsey's law firm.

5. In the petition before this court sworn to October 27, 1972, the petitioner seems to rely only on his claims set forth as paragraph 6 of his petition for a writ of habeas corpus, which is as follows: "Petitioner did not intelligently and voluntarily enter his plea of guilty due to the fact he was not advised of the simultaneous loss of these three federal constitutional rights and due to the fact court did not address petitioner pertaining to all consequences of his plea. (Court only addressed petitioner once and that was to make sure petitioner knew he might be imprisoned by his plea of guilty to charge. Appendix B)." It is not clear what the petitioner meant by his reference to not being advised of the simultaneous loss of these three federal constitutional rights. Nevertheless, I have examined the transcript of the proceedings on the occasion of the entry of the plea and the sentence of the court and I find that there was no infringement of any of the petitioner's rights under the federal constitution.

6. The petitioner does not appear to claim in this proceeding all thirteen grounds which he urged in the Appellate Division for a reversal. He still appears to argue in this proceeding the sixth ground, viz, the trial court illegally imposed a minimum sentence. There is no merit to this contention. The minimum sentence imposed by the court was imposed pursuant to Section 70 of the Penal Law and the reasons therefore were adequately stated by the court as follows: "The crimes in which you participated are those of violence, senseless, unnecessary, and it is the opinion of the court that because of the crimes which you have committed there should be a minimum sentence imposed as well as a maximum. That is all." The minimum imposed was legal.

7. The petitioner appears to assert in this court the eleventh ground asserted in the Appellate Division, viz, the trial court erred by failing to inquire into the facts of the crime to which appellant pleaded guilty. There is no merit to this contention. The transcript of the proceedings at the sentence amply show that the judge was thoroughly familiar with the facts of the crime to which the petitioner pleaded guilty.

8. The petitioner appears to assert in this court ground twelve of the grounds urged in the Appellate Division, viz, "the trial court, in accepting his plea, failed to advise appellant that he was thereby waiving certain constitutional rights. There is no merit to this contention.

9. The petitioner appears to reassert here ground thirteen of his Appellate Division claims, viz, that his plea was voluntary because his attorney misinformed him as to the sentence he might receive. This is not a valid claim of infringement of the petitioner's rights under the federal constitution. If the defendant's retained attorney was mistaken, as to the sentence the petitioner might receive as a result of his guilty plea, and it is not clear from the letter from Dorsey to Barrett that he was misinformed, that does not amount to an infringement of the petitioner's rights under the federal constitution.

10. Lest the petitioner claim in this proceeding that he is now reasserting all of the grounds for reversal asserted in the Appellate Division, on the evidence before me I find that there is no merit to any of the thirteen

grounds set forth by the petitioner as grounds for reversal in the Appellate Division.

11. There is no showing that the petitioner's rights under the federal constitution were infringed with respect to the matters complained of.

CONCLUSION OF LAW

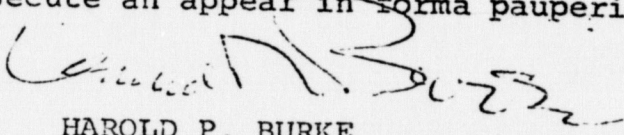
1. Petitioner's application for a writ of habeas corpus is denied.

IT IS HEREBY SO ORDERED.

Certificate of probable cause is denied.

Permission to appeal in forma pauperis is also denied with the qualification that the petitioner may file with the Clerk of the United States District Court, United States Court House, Buffalo, New York, a notice of appeal without the payment of filing fees.

This denial does not prevent the petitioner from applying directly to the Court of Appeals for the Second Circuit, United States Court House, Foley Square, New York City, for a certificate of probable cause and for permission to prosecute an appeal in forma pauperis.


HAROLD P. BURKE
United States District Judge

October 5, 1973.

Certificate of Service

_____, 19____

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

BARRETT, MAIER & BARRETT, P.C.
ATTORNEYS AT LAW

GERALD R. BARRETT
WILLIAM L. MAIER
JOHN M. BARRETT
GREGORY J. MOTT
DENNIS T. BARRETT

80 EAST MAIN STREET
WEBSTER, NEW YORK 14580
PHONE (716) 872-3956

November 13, 1974

William Epstein, Esq.
Legal Aid Society
Federal Defender Services Unit
United States Courthouse
Room 509
Foley Square
New York, New York 10007

Dear Mr. Epstein:

Your questions about Michael Hill's case gave me some hope that there may be a chance to do something for Michael in this difficult matter. I enclose a copy of a letter he sent about a year ago, October 12, 1973 showing some of his ideas on the case. I also enclose a copy of Order in our Monroe County Court, the 15th of September, 1972. I thought you might not have had any contact with that particular proceeding. I think it has very little significance at present. Also enclosed is a copy of Gerald L. Dorsey's July 12, 1973 letter to me. You ask questions as to its interpretation. I suggest that you write Mr. Dorsey direct or call him. He is very approachable and I'm sure would do all he could to help in this situation. The letter seems to me to ignore the question as to what his conversations with Michael were before sentence and rather relates to his own surprise as to the effect of the minimum sentence. If you ask him for more details I am sure he'd respond promptly and you, of course, can refer to your conversation and correspondence with me. Let me know if there is anything further I can do.

Sincerely yours,

BARRETT, MAIER & BARRETT, P.C.

Gerald R. Barrett
Gerald R. Barrett

GRB/cah
Enc.

cc: Mr. & Mrs. Joseph Hill

Certificate of Service

: Nov 18, 1974

I certify that a copy of this brief and appendix
has been mailed to the Attorney General of the State
of New York.

William Epstein